Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies	)	ET Docket No. 92-9

To: The Commission

COMMENTS OF LOWER COLORADO RIVER AUTHORITY ON PETITIONS FOR RECONSIDERATION AND CLARIFICATION

The LOWER COLORADO RIVER AUTHORITY ("LCRA"), by its attorneys and pursuant to Public Notice released by the Federal Communications Commission ("FCC" or the "Commission"),[1] hereby submits its Comments on the Petitions for Reconsideration and Clarification of the First Report and Order and Third Notice of Proposed Rule Making ("Order and Notice") in the above-referenced proceeding.[2] In the Order and Notice adopted in September 1992, the Commission reallocated spectrum in the 2 GHz band for emerging technologies and proposed a transition plan for relocating incumbent fixed microwave licensees from that band.

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[1] These Comments are timely filed within 15 days of publication of the Commission's Public Notice in the Federal Register, 58 Fed. Reg. 13758 (March 15, 1993).

[2] First Report and Order and Third Notice of Proposed Rule Making, 7 FCC Rcd 6886 (1992).

I. BACKGROUND AND PRELIMINARY STATEMENT

LCRA is a public power company that provides electric service to about 44 wholesale customers, including 33 municipalities and 11 cooperatives, in 51 counties in central Texas. It operates private fixed microwave systems on the 2 GHz band to remotely monitor high-power transmission lines, relay critical telemetry data between generating stations and substations, coordinate operations with other electric utilities and for other vital day-to-day functions.

Because of its 2 GHz microwave operations, LCRA has been actively involved in every stage of this proceeding, as a member of the Large Public Power Council and on its own. LCRA's paramount concern is to ensure that deployment of new technologies does not threaten the safety and reliability of electric utilities' private fixed microwave operations.

II. PETITIONS FOR RECONSIDERATION AND CLARIFICATION

On November 30, 1992, petitions for clarification and/or reconsideration of the Order and Notice were filed by the Utilities Telecommunications Council ("UTC"), American Public Power Association ("APPA"), the Pacific Telesis Group ("PacTel") and Apple Computer, Inc. ("Apple"). The petitions raised the following issues: (1) UTC and APPA requested clarification that all state and local government licensees, not just "public safety" licensees, are exempt from involuntary relocation procedures; (2) UTC and PacTel requested clarification that engineering, constructing and testing of new facilities for

displaced microwave licensees may be performed by, or under the direction of, the microwave licensee, even though the emerging technology provider must pay for such activities; (3) UTC requested clarification that microwave licensees will privately own replacement facilities, even though the emerging technology provider must pay for such facilities; (4) UTC requested clarification that a microwave licensee may not be relocated to non-microwave replacement facilities unless the microwave licensee specifically agrees to such alternative facilities; and (5) PacTel requested clarification that the costs of removal and disposal of existing facilities be included in "reasonable additional costs" that microwave licensees may incur as a result of relocation.[3]

III. ALL STATE AND LOCAL GOVERNMENT LICENSEES SHOULD BE EXEMPT FROM INVOLUNTARY RELOCATION PROCEDURES.

LCRA agrees with UTC and APPA that the Commission should clarify that all state and local government licensees, including state and municipally owned electric utilities such as LCRA, are

government licensees should be exempt from mandatory relocation because of special economic and operational considerations in relocating their 2 GHz operations. As UTC and APPA pointed out in their petitions, subsequent Commission actions, including a letter to U.S. Senator Alan C. Cranston, confirmed the Commission's intent to exempt all state and local government licensees from involuntary relocation. Moreover, the September 17, 1992, FCC News Release announcing the Order and Notice listed "public safety" as only one category of "2 GHz fixed microwave operations licensed to state and local governments" that would be exempt.

In the Order and Notice and attached rules, the Commission appears to have changed the state and local government exemption to apply to only certain "public safety" government licensees such as police, fire and ambulance. The Commission failed, however, to explain why the "special economic and operational considerations in relocating their 2 GHz operations" that previously justified exempting all state and local government licensees now justify exempting only "public safety" licensees. Accordingly, the Commission's decision is susceptible to challenge under the Administrative Procedure Act ("APA").

The APA directs that agency action shall be deemed unlawful if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[5] When an agency adopts new rules, it must provide a reasoned explanation, with a factual

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[5] 5 U.S.C. § 706(2)(A).

basis, for choices it makes.[6] Policy reversals also must be justified with factual support in the record.[7] A court will "look carefully at the Commission's reasoning to ensure that all relevant factors and available alternatives were given adequate consideration in the course of the rulemaking proceedings."[8]

The record in this proceeding does not support a distinction between "public safety" government licensees and other state and local government licensees. Police, fire and ambulance are not unique among state and local government licensees in facing special financial and operational constraints. These considerations apply equally to public power systems. LCRA, for example, is a government-owned utility that operates in accordance with government-imposed service obligations. Accordingly, the Commission should clarify that all state and local government licensees, including LCRA and other public power companies, are exempt from the expense and disruption of involuntary relocation.

IV. MICROWAVE LICENSEES CAN ENGINEER AND TEST NEW FACILITIES.

LCRA agrees with UTC and PacTel that the Commission should clarify that engineering, construction and testing of new facilities for displaced microwave licensees may be performed by,

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6 American Mining Congress v. EPA, 907 F.2d 1179, 1187 (D.C. Cir. 1990).

7 See generally Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800 (1973) and Melody Music, Inc. v. FCC, 345 F.2d 730 (1965).

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or under the direction of, the microwave licensee, even though the emerging technology provider must pay for such activities. As currently drafted, the proposed rules direct the new technology provider to perform these tasks, as well as necessary frequency coordination. In most cases, it would be more efficient and practical for the displaced licensee to design and build the new system. The rules should be flexible enough to permit microwave licensees to conduct these activities.

V. MICROWAVE LICENSEES WILL OWN NEW FACILITIES.

LCRA agrees with UTC that the Commission should clarify its rules to specify that any new facilities provided through involuntary relocation will be owned by the microwave licensee, even though the emerging technology entrant must provide the facilities. Electric utilities own and maintain their own private communications systems because they cannot rely on common carriers or other third parties that have competing service demands and are unfamiliar with utilities' unique operational requirements. The Commission has recognized the need for utilities and other industries to operate private systems and should clarify in this proceeding that replacement facilities provided under the transition plan will be owned by the microwave incumbent.

VI. MICROWAVE LICENSEES HAVE OPTION TO AGREE TO NON-MICROWAVE REPLACEMENT FACILITIES.

LCRA agrees with UTC that the Commission should clarify that microwave licensee may not be relocated to non-microwave

replacement facilities unless the microwave licensee specifically agrees to such alternative facilities. This follows from the requirement that the emerging technology entrant provide "comparable alternative facilities" to the displaced microwave licensee. In some circumstances, due to atmospheric or geographic conditions, fiber optics or other alternatives do not provide performance and reliability comparable to microwave facilities. Thus, non-microwave facilities would be unacceptable. The rules should not permit emerging technology entrants to relocate incumbent microwave licensees to non-microwave facilities unless the incumbent licensee agrees that such facilities would be acceptable. Involving the microwave licensee in engineering and constructing the new facilities, as discussed in Section IV, will help ensure that the new facilities will meet the licensee's operational and reliability requirements.

VII. COSTS OF REMOVAL AND DISPOSAL OF EXISTING FACILITIES ARE COMPENSABLE.

LCRA agrees with PacTel that the Commission should clarify that the costs of removal and disposal of existing facilities are included in "reasonable additional costs" microwave licensees may incur as a result of relocation. More generally, the Commission should clarify that it will include as "reasonable additional costs" any other expenses, not currently specified or even foreseeable, that a microwave licensee incurs as a result of relocation.

Respectfully submitted,

[redacted]

CERTIFICATE OF SERVICE

I, Jaime Y.W. Bierds, a secretary for the law firm Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, do hereby certify that a true and correct copy of the foregoing "Comments of Lower Colorado River Authority on Petitions for Reconsideration and Clarification" was delivered by hand, this 30th day of March, 1993, to the following:

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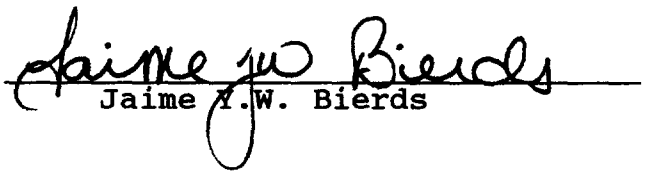

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